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No. 88-1943

In the Supreme Court of the United States

OCTOBER TERM, 1989

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We emphasized in our petition that this is a classically simple case, and that because of its simplicity the application of this Court's equitable estoppel precedents is straightforward. The principal holding of the divided court of appeals is that a statute limiting the wages a disability annuitant may earn will not be applied when a government agent has negligently provided the annuitant with misinformation about the statute. We argued that certiorari is warranted because of the conflict between the judgment below and the holdings of this Court, and because of the confused state of the law on this important issue in the courts of appeals.

The respondent has advanced several arguments in answer to the government's petition. None, however, effectively responds to the reasons for granting the petition.

1. a. Respondent's principal argument rests, ironically, on the ordinariness of his case. Respondent admonishes the government for using this "simple instance" of government "affirmative misconduct" as justification for "a sweeping attack on every aspect of the decision below" (Br. in Opp. 12). Yet it is precisely the "simple" nature of this case that prompts the government to seek further review. Respondent has never claimed that the government agent purposefully or maliciously gave him misinformation. Rather, he has made his case turn on the fact that the information provided to him was wrong. This is precisely the type of situation where this Court has repeatedly declined to estop the government.

In *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947), a government agent incorrectly informed a wheat farmer that his crop would be federally insured, although applicable regulations clearly provided that the crop was not insurable. No estoppel was found to be warranted. In *Montana* v. *Kennedy,* 366 U.S. 308 (1961), a United States consular official in Italy incorrectly informed the petitioner's mother, a native-born citizen of the United States, that because she was pregnant, he was unable to issue her a passport allowing her to return to the United States. The Court held that the officer's misstatement of the relevant law "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth" as a basis for denying him citizenship. 366 U.S. at 314-315. In the case perhaps most directly applicable here, *Schweiker* v. *Hansen,* 450 U.S. 785 (1981) (per curiam), a Social Security claims representative incorrectly informed a claimant that she did not qualify for insurance benefits and failed to advise her that she should file a written application for benefits, although instructions in the Social Security Administration's Claims Manual directed claims representatives to give such advice. The Court concluded that the government representative's erroneous advice and failure to take steps to discover the correct information fell " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with [the law]." *Schweiker* v. *Hansen,* 450 U.S. at 790 (quoting *Montana* v. *Kennedy,* 366 U.S. at 314). Most recently, in *Heckler* v. *Community Health Services,* 467 U.S. 51 (1984), the Court found a pattern of misleading information by a Medicare intermediary insufficient to estop the Secretary of Health and Human Services from enforcing the Medicare statute and regulations.

Under these decisions, an estoppel cannot be imposed against the government solely on the basis that misinformation has been given an individual as a result of ordinary negligence—the exact case presented here.

b. It is precisely the ordinary nature of the negligence at issue that makes this an appropriate case for review. Since the court of appeals elevated ordinary negligence into "affirmative misconduct," this case provides an excellent vehicle for considering whether such misconduct can ever estop the government, and if so, what the governing standard should be.

2. a. Respondent suggests that this case differs from other government estoppel cases that have been before the Court. Thus he argues that *Heckler* v. *Community Health Services, supra,* is inapposite because the party seeking to estop the government in that case had no "entitlement" to the benefits sought, while here respondent "had a vested right to [annuity benefits] as a federal retiree who met all the eligibility conditions" (Br. in Opp. 18).

Respondent's perceived distinction between this case and *Community Health Services*—that here benefits had

vested—begs the very question at issue. The government's position is that respondent was *not* entitled to the annuity for the period in question, because he did not meet the clear statutory requirements for entitlement. Indeed, only the specific relief respondent seeks here—judicial imposition of an equitable estoppel—would permit him to receive these benefits, since the statutory language forbidding benefits in these circumstances is clear. Thus the question of respondent's eligibility—or lack of it—is the very issue presented to the Court.

b. Respondent also attempts to distinguish this case from *Community Health Services,* and from *Schweiker* v. *Hansen, supra,* by urging that "once he had relied on the government and taken action, the effect could never be corrected" (Br. in Opp. 19). He asserts that this was not the case in *Community Health Services* or *Schweiker;* that the not-for-profit hospital in *Community Health Services* could simply return the money wrongfully received, and Ms. Hansen could have simply "file[d] an application" for benefits (*ibid.*). It is true that once respondent exceeded the statutory limit he lost his claim for benefits for a six-month period. However, it is equally true that for every day Ms. Hansen did not apply for benefits because of misinformation, her benefits were irretrievably lost. Similarly, the not-for-profit hospital in *Community Health Services* lost funds it deemed itself entitled to on the basis of erroneous government advice—funds that the hospital claimed it had spent on services to the public, and that would have been financially ruinous to pay back. Respondent, therefore, fails to contend with the clear and precise holdings of this Court's rulings in those cases.

3. Respondent asserts that this Court has in fact estopped the government in the past, citing *Moser* v. *United States,* 341 U.S. 41 (1951), and *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973).

However, neither of these decisions was an estoppel case. *Pennsylvania Industrial Chemical Corp.* was a criminal prosecution, presenting the question of the basis of criminal liability. The Court's decision rested on the absence of fair warning that the conduct in question was proscribed ("to the extent that [government regulations] deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution)." 411 U.S. at 674. See *Community Health Services,* 467 U.S. at 68 (Rehnquist, J., concurring in the judgment).

Moser decided that an alien should not be held to have lost his opportunity for citizenship because he had sought an exemption from military service as a neutral alien. Expressly declining to base its decision on principles of estoppel, 341 U.S. at 47, the Court held that Moser had not knowingly and intentionally waived his right to citizenship, since he had not been advised that under governing law his conduct would result in such a waiver. The question in *Moser,* therefore, was, like the question of waiver of right to counsel, one that turned ultimately on the individual's state of mind. No one contends here that respondent's intention to earn more, or less, than the statutory maximum is a relevant issue under the statute itself.[1]

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[1] As Judge Friendly observed in his dissenting opinion, no Supreme Court case has ever gone counter to the holding in *Federal Crop Ins. Corp.* v. *Merrill, supra,* and while "some courts and commentators have sought to find a contrary indication in *Moser* v. *United States,* 341 U.S. 41, 47 (1951), * * * this is an instance of the wish being father to the thought." *Hansen* v. *Harris,* 619 F.2d 942, 950 (2d Cir. 1980), rev'd, 450 U.S. 785 (1981). See also, *Heckler* v. *Community Health Services,* 467 U.S. at 68 (Rehnquist, J., concurring in the judgment).

Moser and *Pennsylvania Industrial Chemical Corp.* are particularly inappropriate cases on which to erect an estoppel in this instance because neither of those decisions imposed financial liability on the government in circumstances not authorized by law. As noted in our petition (at 10 n.4), when Congress enacted the Federal Tort Claims Act it expressly exempted the United States from "[a]ny claim arising out of," *inter alia*, "misrepresentation" or "deceit." 28 U.S.C 2680(h). The congressional concerns that preclude tort remedies against the United States on the basis of misrepresentations by government agents also preclude an equitable estoppel against the government that would have the effect of charging the Treasury in violation of a specific statutory mandate. See *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988) ("[I]t is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' ") (second brackets in original).[2]

4. Respondent asserts that the traditional elements of estoppel against a private party are present in this case. We argued in our petition that they were not (Pet. 12-15), and noted both that reliance under the circumstances here was not reasonable and that equitable considerations did not support an estoppel.[3]

But even if these traditional elements of private party estoppel are present, as respondent contends, the critical

[2] Respondent also cites, in support of his estoppel argument, the decisions of this Court in *Honda* v. *Clark*, 386 U.S. 484 (1967), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). However, these were both cases in which the Court found that tolling of the applicable limitations period was required by the statutory scheme itself. Moreover, in *Clark*, the Court specifically rejected an estoppel theory. See 386 U.S. at 500.

[3] As Judge Mayer observed in dissent below, "Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers" (Pet. App. 19a).

questions remain whether estoppel is ever permissible against the government, and if so, what kind of additional showing must be made before such an estoppel can be imposed. Respondent does not dispute our contention that the courts of appeals are in disarray on those questions. The straightforward nature of this case makes it an especially appropriate vehicle for clarification of the law.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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